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May 28, 1996

VIA HAND DELIVERY

William F. Caton
Acting Secretary
Federal Communications Commission
Room 222
1919 M Street, N.W.
Washington, D.C. 20554

Re: Ex Parte Presentation in CS Docket 96-46

Dear Mr. Caton:

Pursuant to 47 C.F.R. § 1.1206, I submit this original and one copy of a letter disclosing a written ex parte presentation in the above-referenced proceeding.

On May 28, 1996, the undersigned, on behalf of the National League of Cities; the United States Conference of Mayors; the National Association of Counties; the National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; the City of Los Angeles, California; the City of Chillicothe, Ohio; the City of Dearborn, Michigan; the City of Dubuque, Iowa; the City of St. Louis, Missouri; the City of Santa Clara, California; and the City of Tallahassee, Florida, submitted the attached memorandum by electronic mail to Jackie Chorney of Commissioner Hundt's office; Lauren J. Belvin of Commissioner Quello's office; Suzanne Toller of Commissioner Chong's office; Mary P. McManus of Commissioner Ness's office; Meredith Jones, Rick Chessen, Gary M. Laden, and John E. Logan of the Cable Services Bureau; and Christopher J. Wright of the Office of General Counsel. (A message from the Commission's mailer-daemon indicated that the electronic mail message could not be delivered to Mss. Belvin, Jones, and Toller.) The same document was delivered in hardcopy to each of the above on May

29, 1996. In addition, the same document was sent by electronic mail and delivered by hand on May 29, 1996, to Chairman Reed E. Hundt; Commissioner Rachelle B. Chong; Commissioner Susan Ness; and Commissioner James H. Quello.

Very truly yours,

MILLER, CANFIELD, PADDOCK AND STONE, P.L.C.

By

Frederick E. Ellrod III

Enclosure

cc: Lauren J. Belvin
Rick Chessen
Commissioner Rachelle B. Chong
Jackie Chorney
Chairman Reed E. Hundt
Meredith Jones
Gary M. Laden
John E. Logan
Mary P. McManus
Commissioner Susan Ness
Commissioner James H. Quello
Suzanne Toller
Christopher J. Wright

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OPEN VIDEO SYSTEMS
(CS Docket No. 96-46)

May 28, 1996

National League of Cities; United States Conference of Mayors; National Association of Counties; National Association of Telecommunications Officers and Advisors; Montgomery County, Maryland; City of Los Angeles, California; City of Chillicothe, Ohio; City of Dearborn, Michigan; City of Dubuque, Iowa; City of St. Louis, Missouri; City of Santa Clara, California; and City of Tallahassee, Florida

The Problem.

The above commenters are concerned that the Commission may be headed toward OVS rules that are both unworkable and constitutionally vulnerable. The problems local government organizations anticipate are practical and real.

The Commission must recognize that the basic relationship between a local government and *all* right-of-way occupants is landlord-tenant. Local governments own the public rights-of-way in fee, typically. Local governments, like private landlords, consent to the authorized use and occupancy of this property based on negotiated terms and conditions of use and compensation. Local Governments do not seek to regulate OVS services. They do seek to retain ownership and management control of local public property. Local government must have full discretion to control the placement and operation of physical intrusions and fixtures to the rights-of-way. The entire community of taxpayers buys and maintains the rights-of-way. Special user groups, like tenants of other real property, must negotiate the terms and conditions of their use. This is the requirement of the Fifth Amendment.

Like all other real property, each street and alley and superhighway is physically unique. Each has its own unique purpose and value. San Francisco sand, Denver clay and Miami peat conditions each dictate different construction techniques and facility operations. The value of access to Fifth Avenue in Manhattan is different than for Locust Street in Kansas City. And the

costs to each local government of acquiring, building and managing rights-of-way are just as variable.

Recommendations.

I. **The rules should allow communities discretion to obtain full compensation for the real property interests conveyed in a right-of-way use permit.** The 1996 Act does not authorize taking non-federal property at all. And the Commission does not have budget authority to compensate states and localities for any taking. ***Examples:***

- The exact role of states, counties, cities, townships and villages varies widely. In some jurisdictions, state law precludes "franchise fees"; in others, they are the only form of compensation. A federal "fee in lieu of a franchise fee" does not accommodate the varied forms of compensation now extant for right-of-way occupancy. If the "fee in lieu" is the only form of compensation permitted, it is a certainty that many jurisdictions will be left with no compensation at all.

- OVS operators are certain to argue that bonds, insurance, construction requirements and additional facilities such as traffic monitoring cameras that reduce the need for future right-of-way construction are unauthorized compensation. The Commission cannot be the arbitrator of the varied terms of occupancy appropriate for 8 million miles of local streets and alleys.

II. **The compensation scheme must be stable over the long term, and not create incentives for other right-of-way occupants to reduce or avoid future obligations.** Any rules that allow an OVS operator to pay only a "fee in lieu of franchise fee" will be unstable. It will miss many indirect forms of compensation such as construction requirements to mitigate impacts on abutting property owners. And it creates an inevitable "ratcheting down" over time as cable operators renegotiate based on lower OVS requirements.

The existing requirements of a current cable operator are not an accurate test of appropriate requirements for OVS. In Milpitas, CA, PacTel proposed a video dialtone technology that required standby gasoline generators in the parking strips of the city! Simply imposing cable operators' requirements may thus be irrelevant to the real community impacts.

Finally, cable franchises serving about 1/3 of all subscribers are up for renewal in the next three years. These 15- to 30-year-old franchises are not the appropriate "base line"

for OVS obligations. These cable operators will refuse to enter new agreements if they perceive the OVS operator as having better terms and conditions.

III. **Allowing a cable operator affiliate or any other "person" to be an OVS operator will make the system unsustainable.** ***Examples:***

- A cable operator converts to OVS upon expiration of its current franchise agreement if it will get more favorable, less expensive terms.

- Any "person" can be an OVS operator, including an affiliate of a cable operator (which itself is almost always a shell company subsidiary or limited partnership controlled by the parent MSO). The cable franchisee goes out of business, and a new affiliate or subsidiary purchases the cable assets as an OVS operator.

- An OVS operator displaces an existing cable operator by driving it out of the market.

In each case, all of the statutory assumptions of OVS will be undone:

- The community will lose the statutory standard against which the "fee in lieu" and PEG requirements must be measured.

- It will be impossible to update the OVS operator's PEG requirements as the needs and interests of the community develop.

- The cable operator will lose its incentive to negotiate in good faith with the community. It will either convert to OVS, or treat OVS obligations as a ceiling on all future obligations.

Section 653(a)(1) makes OVS operation a unique option available only to LECs. "Any person" may lease capacity for programming from the OVS operator. This right of access implements and confirms the nature of OVS as a ***open*** system.

IV. **The Commission's rules must be consistent with practical right-of-way management.** Every right-of-way occupant has normal tenant obligations as a ***precondition*** of entry into the rights-of-way. Such obligations include:

- construction procedures and obligations to restore damage to rights-of-way
- coordination procedures to minimize interference with other tenant right-of-way users (permanent and transient) and disruption due to construction and trenching
- rules to prevent safety hazards based on conditions in the locality

- requirements of adequate insurance based on conditions in the locality
- performance bonds or letters of credit to secure necessary costs
- indemnification of the municipality against third-party claims
- reimbursement of municipal costs and expenses

These requirements must be in place ***before*** construction and right-of-way disruption begins. Thus, a right-of-way agreement prior to construction is a practical necessity.

Right-of-way management is complex and individual to the community. ***Examples:***

- Historic districts: *e.g.*, Alexandria, Williamsburg
- Measures to preserve and protect street surfaces: *e.g.*, San Francisco's requirement that new street paving not be further disturbed for three years
- coordination of construction: the I-270 corridor presents coordination problems different from those of a residential neighborhood. A low-density rural area in a flood zone has problems different from those of a downtown financial center with respect to liability, public safety, scheduling.

Thus, effective, practical right-of-way management ***requires*** agreement between the right-of-way user and the local government.

V. The Commission should create *federal* rules and regulations. Local procedures and property issues should be left to local law and processes. The new federal OVS service does need federal rules that regulate the terms and conditions of service to subscribers. The Commission should also consider terms that ensure fair competition between video providers. To accomplish these objectives, however, there is no need to preempt local public property rights. The Commission will have time to observe the development of OVS after these first rules are in place and can always consider additional rules later. There is no need and no record — and no statutory authority — to justify preempting property rights of local governments and forcing federal taxpayers to subsidize OVS operators. Thus, the Commission should focus on federal rules and obligations at this time. Any other approach will result in unacceptable disruption to existing contracts and business expectations, in addition to constitutional and legal problems.